Supreme Court, U.S.
FILED
DEC 11 1998
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No. 98-784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PMC, INC.,

Petitioner,

vs.

THE SHERWIN-WILLIAMS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

KIM K. BURKE
J. STEVEN JUSTICE
TAFT, STETTINIUS
& HOLLISTER L.L.P.
1800 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

J. TIMOTHY EATON
Counsel of Record
WILLIAM L. SIEBERS
UNGARETTI & HARRIS
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400

Attorneys for Respondent

150135

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

I. Whether the Court should deny PMC's petition for certiorari because the only Circuit courts to address the issue whether a CERCLA section 113(f)(1) contribution claim preempts state law claims, have all consistently held that a CERCLA section 113(f)(1) contribution claim does preempt state law claims?

II. Whether the Court should exercise judicial restraint and deny PMC's petition for certiorari because, if in the Court's view a conflict does exist between the Seventh Circuit's decision in *PMC* and the Ninth Circuit's decision in *Stanton*, the time is not ripe to resolve the conflict?

III. Whether this Court should deny PMC's petition for certiorari when this appeal is at an interlocutory stage and the final disposition of the case may grant PMC the relief it is seeking?

IV. Whether PMC's past costs claim for less than one million dollars is sufficient to warrant this Court's review?

V. Whether this Court should review the CERCLA preemption issue when Sherwin-Williams raised independent state grounds that would deny PMC any recovery under the Illinois Contribution Act?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Pursuant to Rule 29(6) of the Rules of the Supreme Court, Sherwin-Williams has no parent companies. The following are nonwholly owned subsidiaries of Sherwin-Williams:

Beijing Pratt & Lambert Paints Joint Venture Limited Liability Company
FSW Coatings Limited
FSW Paints Limited
Hidrax S.A.
John's Color Wheel and Decorating, Inc.
Kayney Paints, Inc.
Duracoat Powder Manufacturing Inc. (Canada)

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STATEMENT OF THE CASE

PMC bought its Chicago facility in 1985 from Sherwin-Williams. At the time that PMC bought the property, it knew toxic wastes were located on the property. Pet. App. at A-11.[1] Indeed, in 1981 Sherwin-Williams filed with the United States Environmental Protection Agency a Notification of Hazardous Wastes Site under section 103(c) of CERCLA in which it stated that

> there were drums buried at the Historic Sherwin-Williams Site, releases of waste to the environment were likely, and that manufacturing residue [was] dumped in the low-lying areas south of Kensington Avenue.

Pet. App. at B-5.

PMC has been operating its chemical operations at the site since 1985. The district court found the following:

> During its ownership and operation of the PMC Facility, PMC (through divisions or subsidiaries) has at various times manufactured alkali blue, para-cresol, dinitroparacresol, ononitroparacresol and isophthalonitrile. In addition, the following chemicals and/or hazardous substances have been spilled onto the soil and/or groundwater or have leaked or spilled into the facility's sewer system:
>
> | | |
> |---|---|
> | cresol | sodium hydroxide |
> | toluene | meta-xylene |
> | sulfuric acid | E-benzene |
> | sodium toluene | nitric acid |
> | aniline | ethyl benzene |
> | hydrochloric acid | TSA |

Pet. App. at B-6.

1. All record citations are to Petitioner's Appendicies A and B.

On December 8, 1992, the Illinois Environmental Protection Agency ("IEPA") issued a notice to PMC pursuant to section 4(q) of the Illinois Environmental Protection Act (the "4(q) Notice"). The Notice stated that

> the release of hazardous substances at, from or attributable to the [PMC Facility] and the continuing threat of release at the PMC Facility present an immediate and significant risk of harm to human health, welfare and the environment

and that "the actions required by this Notice are necessary to protect human health, welfare, and the environment." Pursuant to the 4(q) Notice, the IEPA ordered PMC to investigate whether a release of hazardous substances occurred at the PMC Facility, to complete appropriate response actions, and to reimburse the IEPA for response and oversight costs. Pet. App. at B-11.

Following the issuance of the 4(q) Notice, PMC brought this action against Sherwin-Williams in 1993 seeking, *inter alia*, damages under CERCLA, RCRA, and under various state law theories. Subsequent to the initiation of this proceeding, the State of Illinois sued PMC for its contamination of the land at its facility, and also for air and water violations unrelated to this proceeding.

In its complaint against Sherwin-Williams, PMC sought recovery under CERCLA based upon sections 107(a) and 113(f)(1). Under section 107(a), an aggrieved party who is not among the parties liable for the contamination at the site in question may obtain joint and several liability against those parties who are liable for the contamination. In contrast, in section 113(f)(1), Congress provided the opportunity for a liable party to seek contribution from other liable or potentially liable parties. Thus, liability under section 113(f)(1) is several only

and commonly used by parties to recover costs subject to the strict requirements of the national contingency plan.

In its cause of action under section 107(a), PMC did not invoke an "innocent land owner" defense. Pet. App. at A-10. In fact, the district court found that PMC's operations may have contributed to the organic compound contamination in the soil and/or groundwater through spills and leaks at the site. Pet. App. at B-6. Thus, although PMC sought recovery under both sections 107 and 113 of CERCLA, the Seventh Circuit observed that "since PMC did spill some toxic waste on the property, it may not be entitled to any relief under [section 107]." Pet. App. at A-10. In assessing the viability of PMC's section 113 claim under CERCLA, the Seventh Circuit concluded that PMC:

> [I]s not a victim of toxic waste contamination in any realistic sense. It bought the property from Sherwin-Williams knowing there were toxic wastes there, and by buying it became a responsible party strictly liable for the consequences of those wastes. That PMC may have rights against other, more culpable responsible parties does not change PMC into the victim of a tort, it is merely the less guilty of two tortfeasors.

Pet. App. at A-11.

The district court denied PMC's right to recover response costs under CERCLA because of PMC's failure to "provide for public comment" in violation of the 1990 National Contingency Plan. Pet. App. at B-19. Although the district court recognized the importance of adherence to a national environmental regulatory scheme, the court awarded PMC its past response costs under the Illinois Contribution Act. Pet. App. at B-22.

The Seventh Circuit reversed the district court's award of past costs under the Illinois Contribution Act:

> PMC's invocation of Illinois' contribution statute is an attempt to nullify the sanction that Congress imposed for the kind of CERCLA violation that PMC committed.
>
> . . . CERCLA's savings clause must not be used to gut provisions of CERCLA.

Pet. App. at A-12.

PMC is petitioning to this Court from the Court of Appeals' reversal of its recovery under the Illinois Contribution Act.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS' INTERPRETATION OF CERCLA IN *PMC, INC. v. SHERWIN-WILLIAMS CO.* DOES NOT CONFLICT WITH PRIOR DECISIONS OF THE NINTH AND TENTH CIRCUITS.

Contrary to PMC's assertion, the Seventh Circuit's interpretation of CERCLA in *PMC, Inc. v. Sherwin-Williams Co.* does not conflict with prior Ninth and Tenth Circuit decisions interpreting CERCLA because, in pertinent part, each of the courts construed different sections of the CERCLA statute.

In *PMC*, the Seventh Circuit addressed the interplay of CERCLA's contribution provision in section 113(f)(1), 42 U.S.C. § 9613(f)(1) (1994), and the Illinois Joint Tortfeasor

Contribution Act (the "Illinois Contribution Act"), 740 Ill. Comp. Stat. 100/2(a) (West 1997). Pet. App. at A-8-12. The Seventh Circuit noted that because PMC failed to incur its past response costs consistent with the statutory requirements of the national contingency plan, the district court held that PMC could not obtain any contribution under CERCLA § 113(f)(1) from Sherwin-Williams for those cleanup costs. Pet. App. at A-9. Indeed, PMC accepted this ruling. *Id.* at A-9. Nevertheless, the district court allowed PMC to obtain under the Illinois Contribution Act the same past response costs that the district court would not allow under section 113(f)(1) of CERCLA. *Id.*

On appeal, Sherwin-Williams argued that the district court's award of response costs under the Illinois Contribution Act improperly circumvented CERCLA's limitation on contribution, and the Seventh Circuit agreed. *Id.* at A-11-12. The Seventh Circuit emphasized that Congress limited the right of contribution under section 113(f)(1) of CERCLA by requiring consistency with the national contingency plan. *Id.* at A-11. If that requirement is violated, the sanction is denial of contribution under CERCLA. *Id.* Thus, the Seventh Circuit concluded that in essence,

> PMC's invocation of Illinois' contribution statute [wa]s an attempt to nullify the sanction that Congress imposed for the kind of CERCLA violation that PMC committed.

Id.

The Seventh Circuit recognized CERCLA's savings clause, which states that nothing in CERCLA

> shall affect or modify in any way the obligations or liabilities of any person under other Federal or State

> law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants

42 U.S.C. § 9652(d) (1994); *Id.* at A-10. PMC has, however, attempted to broaden this provision beyond its plain intent, as various courts have found. The Seventh Circuit stated that the purpose of CERCLA's savings clause was "to preserve to victims of toxic wastes the other remedies they may have under federal or state law." *Id.* Significantly, however, the Seventh Circuit emphasized that PMC was not a victim of environmental contamination in this case:

> PMC ... is not a victim of toxic-wastes contamination in any realistic sense. It bought the property from Sherwin-Williams knowing there were toxic wastes there, and by buying it became a responsible party strictly liable for the consequences of those wastes. That PMC may have rights against other, more culpable responsible parties does not change PMC into the victim of a tort; it is merely the less guilty of two tortfeasors.

Id. at A-10-11.

More importantly, the Seventh Circuit noted that a savings clause is not intended to allow specific provisions of the statute that it contains to be nullified. *Id.* at A-11. Thus, it concluded that PMC could not use CERCLA's savings clause "to gut the provisions of CERCLA," and thereby recover its past response costs under the Illinois Contribution Act. *Id.*

In *PMC*, the Seventh Circuit partially relied on the Third Circuit's analysis in *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997). In *Reading*, third-party plaintiff Conrail brought claims

under CERCLA and state common law contribution and restitution against Reading for the recovery of past response costs. *Id.* at 1117. The Third Circuit concluded with respect to CERCLA that Conrail, as a potentially responsible party, was limited to bringing a contribution claim against Reading under section 113(f)(1). *Id.* at 1120-21. Most importantly, the Third Circuit held that Conrail's CERCLA claim under section 113(f)(1) preempted its state common law claims for contribution and restitution because the common law claims negated the contribution scheme in section 113(f)(1) of CERCLA. *Id.* at 1117. Although the Third Circuit had declined to find an actual inconsistency between CERCLA and state regulation in other cases, *id.* (citing *Witco Corp. v. Beekhuis*, 38 F.3d 682, 688-90 (3d Cir. 1994) (finding no conflict between CERCLA statute of limitations for contribution and Delaware state law limiting time period for claims against decedent's estate); *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 127 (3d Cir. 1991) (finding no conflict between CERCLA and cost recovery provisions of New Jersey Spill Compensation and Control Act)), the Third Circuit found in favor of CERCLA preempting state law in *Reading* because the state common law remedies obstructed the intent of Congress. *Id.*

> [W]hen Congress expressly created a statutory right of contribution in CERCLA § 113(f)(1), 42 U.S.C. § 9613(f), it made that remedy a part of an elaborate settlement scheme aimed at the efficient resolution of environmental disputes. Permitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress. We conclude therefore that Conrail's common law claims are preempted by CERCLA § 113(f)(1).

Id.

Recently, the Second Circuit in *Bedford Affiliates v. Sills*, 156 F.3d 416, 425-27 (2d Cir. 1998), faced the same preemption arguments raised in *Reading*, and it followed the reasoning of the Third Circuit in holding that the contribution scheme realized in section 113(f)(1) of CERCLA preempted state common law claims for restitution and indemnification.

Taken together, the Seventh, Third, and Second Circuit decisions stand for the proposition that if a party brings both a contribution claim pursuant to section 113(f)(1) of CERCLA and state law claims for recovery of those same response costs, and if the state law claims conflict with the express contribution scheme in section 113(f)(1) of CERCLA by nullifying, obstructing, or circumventing the intent of Congress, the state law remedies will be preempted.

PMC contends that the decisions of Seventh, Third, and Second Circuits analyzed above are in conflict with the Ninth Circuit's decision in *Stanton Road Associates v. Lohrey Enterprises*, 984 F.2d 1015 (9th Cir. 1993), and the Tenth Circuit's decision in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994). PMC fails to recognize a critical distinction that neither decision conflicts with the decisions of the Seventh, Third, and Second Circuits because neither the Ninth nor Tenth Circuit decisions addressed the issue of preemption of state law claims in the context of a contribution claim brought pursuant to section 113(f)(1) of CERCLA.

In *Stanton*, the Ninth Circuit, in part, faced the issue of whether CERCLA authorizes an award of future response costs under section 107. 984 F.2d at 1016. The defendants owned and operated a dry cleaning facility contiguous to the property of Stanton Road Associates ("Stanton"). *Id.* During the operation of the dry cleaning facility, a hazardous chemical

was released, and it ultimately contaminated Stanton's property. *Id.* As an innocent land owner whose property had been contaminated through no fault of its own, Stanton sued for response costs under *section 107 of CERCLA*, 42 U.S.C. § 9607 (1994) (which allows relief to an innocent landowner), for declaratory relief under section 113(g) of CERCLA, 42 U.S.C. § 9613(g) (1994), and for damages under state law claims for trespass, negligence, and nuisance. *See id.* at 1016, 1021. The district court found the defendants liable and, in part, awarded Stanton future response costs of $1,100,000 under both CERCLA and state law. *Id.* at 1017.

The Ninth Circuit held that the district court erred in awarding Stanton future cleanup costs under section 107 of CERCLA because a party must actually incur response costs before they can be recovered and because those response costs must be necessary and consistent with the national contingency plan. *Id.* at 1021. At the time of the district court's decision, Stanton had not cleaned up its property. *Id.* Thus, Stanton had not yet incurred its future response costs, and it was impossible for Stanton to prove that the future response costs were necessary and consistent with the national contingency plan. *See id.*

The district court, however, had awarded the future response costs to Stanton under CERCLA and the state law claims. *Id.* Before the Ninth Circuit, the defendants argued that the district court could not award Stanton future response costs under state law because such a ruling would permit Stanton to circumvent CERCLA's requirement that response costs be necessary and consistent with the national contingency plan. *Id.* The Ninth Circuit found the defendants' argument meritless. *Id.* In light of CERCLA's savings provision in section 302, 42 U.S.C. § 9652(d), and other language in section 114 of CERCLA, 42 U.S.C. § 9614(b) (1994), implying that a party

can recover other types of damages under either CERCLA or state law, the Ninth Circuit held in the context of a *section 107 claim* (the innocent landowner provision) that CERCLA did not preempt Stanton's recovery of future response costs. *Id.* at 1021-22.

Significantly, however, unlike the Seventh Circuit in *PMC*, the Third Circuit in *Reading*, and the Second Circuit in *Bedford*, the Ninth Circuit did not address whether a contribution claim brought pursuant to section 113(f)(1) of CERCLA preempts state law claims. The Ninth Circuit did not address this question because, as an innocent land owner, Stanton brought a claim for response costs under *section 107* of CERCLA and sought joint and several liability against the defendants. Indeed, the Ninth Circuit had no need to discuss whether the elaborate settlement scheme that Congress instituted in section 113(f)(1) of CERCLA for contribution claims should preempt state law claims that conflict with the Congressional scheme because Stanton did not bring a CERCLA contribution claim. Therefore, the Ninth Circuit has yet to address the specific issue that the Seventh Circuit addressed in *PMC*, that the Third Circuit addressed in *Reading*, and that the Second Circuit addressed in *Bedford*. As such, no conflict exists with the Ninth Circuit and the other circuits on this issue.

PMC also claims that the Tenth Circuit's decision in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), conflicts with the Seventh, Third, and Second Circuit decisions discussed above. Again, this assertion is inaccurate. In *Colorado*, the Tenth Circuit did not address whether a section 113(f)(1) CERCLA contribution claim preempts state law claims. At issue in *Colorado* was whether the Colorado Department of Health ("CDH"), which the United States Environmental Protection Agency ("EPA") had authorized to carry out the state hazardous waste program in lieu of the federal Resource Conservation

and Recovery Act ("RCRA"), was precluded from doing so at a hazardous waste treatment, storage, and disposal facility owned and operated by the United States Army, which the EPA had placed on the national priority list, and where a CERCLA response action, initiated by the Army, was underway. *Id.* at 1568-69.

Pursuant to the Colorado Hazardous Waste Management Act ("CHWMA"), the CDH issued a compliance order to the Army requiring the Army to submit a closure plan for the Rocky Mountain Arsenal, which was one of the worst hazardous waste pollution sites in the country. *Id.* at 1569, 1573. The Army, which was also engaged in a CERCLA response action at the site, refused to comply with the CDH's order. *See id.* at 1572-74. Ultimately, the United States brought a declaratory action in federal court and sought a court order declaring the CDH's compliance order null and void and enjoining Colorado and the CDH from taking any action to enforce it. *Id.* at 1573-74. The district court held, pursuant to section 113(h) of CERCLA, 42 U.S.C. § 9613(h) (1994), that it did not have jurisdiction to review the CDH's "challenge" to the CERCLA response action at the Rocky Mountain Arsenal site, and the court granted the United States the relief it requested. *Id.* at 1574.

Relying on CERCLA's savings provision, 42 U.S.C. § 9652(d), and section 114(a) of CERCLA, which states that

> [n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State,

42 U.S.C. § 9614(a) (1994), the Tenth Circuit concluded that the district court erred:

> By holding that § 9613(h) bars Colorado from enforcing CHWMA, the district court effectively modified the Army's obligations and liabilities under CHWMA contrary to § 9652(d), and preempted Colorado from imposing additional requirements with respect to the release of hazardous substances contrary to § 9614(a).
>
> * * *
>
> . . . In light of §§ 9652(d) and 9614(a), which expressly preserve a state's authority to undertake such action, we cannot say that Colorado's efforts to enforce its EPA-delegated RCRA authority is a challenge to the Army's undergoing CERCLA response action.

Colorado, 990 F.2d at 1576. The Tenth Circuit reversed the district court's decision and vacated the order prohibiting Colorado and the CDH from taking any action to enforce its compliance order. *Id.* at 1584.

Clearly, this brief survey of the Tenth Circuit's decision in *Colorado* is sufficient to dispel PMC's assertion that this case conflicts with the Seventh Circuit's decision in *PMC*, the Third Circuit's decision in *Reading*, and the Second Circuit's decision in *Bedford*. In *Colorado*, the Tenth Circuit never addressed whether a section 113(f)(1) CERCLA contribution claim preempted state law claims. The Tenth Circuit in *Colorado*, like the Ninth Circuit in *Stanton*, addressed the issue of preemption with respect to other portions of CERCLA, not a contribution claim brought pursuant to section 113(f)(1). As such, the Tenth Circuit and Ninth Circuit decisions are like other Third Circuit decisions cited in *Reading* wherein the Third Circuit has held, with respect to other portions of CERCLA, that state law is not preempted.

At present only three federal appellate courts have squarely addressed the issue of whether a contribution claim brought pursuant to section 113(f)(1) of CERCLA preempts state law claims: the Seventh Circuit, the Third Circuit, and the Second Circuit. All three consistently have held that a section 113(f)(1) CERCLA contribution claim preempts state law claims. Because no conflict exists among the federal circuits on this issue, Sherwin-Williams respectfully requests that the Court deny PMC's petition for a writ of certiorari.

II.

THE COURT STILL SHOULD DENY PMC'S PETITION BECAUSE THE TIME IS NOT RIPE TO RESOLVE THE CONFLICT IF, IN THE COURT'S VIEW, A CONFLICT DOES EXIST BETWEEN THE SEVENTH CIRCUIT'S DECISION IN *PMC* AND THE NINTH CIRCUIT'S DECISION IN *STANTON*.

Among the federal appellate decisions discussed in PMC's petition, only the Seventh Circuit's decision in *PMC* and the Ninth Circuit's decision in *Stanton* have addressed the issue of whether allowing a party, who seeks response costs under CERCLA and state law and who has not complied with the national contingency plan, to recover under state law improperly circumvents or nullifies CERCLA's requirement that response costs be necessary and consistent with the national contingency plan. In the context of Stanton's CERCLA section 107 claim, the Ninth Circuit said no and held that CERCLA did not preempt such a state law recovery. *Stanton*, 984 F.2d at 1021-22. In the context of PMC's CERCLA section 113(f)(1) contribution claim, the Seventh Circuit said yes and held that PMC could not recover under the Illinois Contribution Statute because to allow such recovery would nullify the sanction that Congress had imposed in CERCLA for violation of the national contingency plan. Pet. App. at A-11.

In the event that the Court finds the Seventh Circuit decision and the Ninth Circuit decision in conflict, the Court still should exercise its discretion to deny PMC's petition because the time is not ripe to resolve the conflict. Given that only two federal circuits have addressed the issue noted above, the Court would be prudent to await further litigation that might produce a consensus or a satisfactory majority view among the lower courts. Indeed, Justice Brennan once observed that

> there is already in place, and has been ever since I joined the Court [in 1956], a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question.

Justice William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983). In a broader sense, Justice Stevens has iterated the same conclusion:

> [T]he existence of differing rules of law in different sections of our great country is not always an intolerable evil. . . . It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Justice John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982).

Therefore, based on the foregoing reasoning, Sherwin-Williams respectfully requests that the Court exercise judicial restraint and deny PMC's petition for a writ of certiorari.

III.

THIS COURT SHOULD DENY PMC'S PETITION BECAUSE THE APPEAL IS INTERLOCUTORY AND OTHER CLAIMS REMAIN IN THE DISTRICT COURT THAT COULD GIVE PMC A FULL RECOVERY OF ITS PAST COSTS.

This Court does not ordinarily grant a petition for certiorari when the appeal is at an interlocutory stage. Stern, Gressman, Shapiro and Geller, *Supreme Court Practice* 196 (7th ed. 1993).

> The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered to an appeal from an interlocutory order is intended to be and is sparingly exercised.

City & County of Denver v. New York Trust Co., 229 U.S. 123, 133 (1912). Justice Breyer articulated the rationale behind this Court's long-standing principle of denying review to interlocutory orders in *Johnson v. Jones*, 515 U.S. 304, 307 (1995):

> Interlocutory appeals . . . are the exception, not the rule. [An interlocutory appeal] risks additional, and unnecessary appellate work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

The facts of this case require application of the rule denying interlocutory review — not the exception.

PMC is seeking past response costs not only under CERCLA and the Illinois Contribution Act but also in separate

state law counts based upon breach of contract and fraud. The district court held a hearing in November, 1996 concerning PMC's CERCLA, RCRA, and contribution claims. All other counts were stayed.

On April 23, 1997, the district court denied PMC's claim for past response costs under CERCLA, awarded those same past costs to PMC under the Illinois Contribution Act, and, *inter alia*, entered an injunction in favor of PMC and against Sherwin-Williams under RCRA. Sherwin-Williams appealed the RCRA injunction and several related claims pursuant to 28 U.S.C. § 1292(a), which permits interlocutory appeals of injunctions. Subsequent to that appeal, the district court granted PMC's motion pursuant to Rule 54(b) of the Federal Rules of Civil Procedure to certify the remaining counts decided in the April 23rd judgment. At the time of the entry of the Rule 54(b) Order by the district court, both the court and the parties agreed that there would be no further proceedings on the counts not tried and remaining in the district court until the conclusion of the appeal. Two of those remaining counts included PMC's counts based upon breach of contract and fraud seeking damages for its past response costs. Those counts still remain pending in the district court and await trial.

Although Sherwin-Williams disputes PMC's entitlement to any recovery under the remaining counts before the district court, the disposition of those counts may result in PMC's recovery of the same damages it is seeking under its state Contribution Act claim. If PMC recovered those past response costs under either its contract claim or fraud claim, the appeal before this Court would be moot.

If this Court grants PMC's petition for certiorari before a final judgment is entered, it would risk the very event Judge Breyer warned against in *Johnson*: "[H]ad the trial simply proceeded, [the appeal] would have turned out to be

unnecessary." Moreover, as Justice Stevens aptly stated in his dissent in *Estelle v. Gamble*, 429 U.S. 97, 115 (1976), the interest of judicial economy is ill-served when this Court violates its normal practice of denying interlocutory review.

PMC's petition for certiorari should be denied because it does not present the type of case that deserves exceptional treatment from this Court's normal practice of denying interlocutory review.

IV.

PMC'S PAST COSTS CLAIM FOR LESS THAN ONE MILLION DOLLARS IS NOT SUFFICIENT TO WARRANT THIS COURT'S REVIEW.

The claim PMC is making for past response costs stemming from clean-up activities at the PMC site is less than one million dollars.[2] The issue that PMC raises in its petition does not involve an especially large amount of money. Indeed, of all of the issues that the district court addressed in its April 23, 1997 judgment, PMC's award for past costs, monetarily, was the least significant claim decided.

Although the Court has granted certiorari where the damages claimed "may amount to one hundred million dollars," *see United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983), or where "billions of dollars were at stake," *see United States v. Zazov*, 334 U.S. 602, 614 n.7 (1948), or where there is significant issue of fiscal importance to a state, *see Alaska v. American Can Company*, 358 U.S. 224, 225 (1959), the alleged damages at issue in this case are less than one million dollars. For this reason alone, PMC's petition does not merit the Court's review.

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2. The district court has not made an award of prejudgment interest on these amounts.

V.

PMC'S CLAIM UNDER THE ILLINOIS CONTRIBUTION ACT SHOULD ALSO HAVE BEEN DENIED BECAUSE IT FAILED TO MEET STATE LAW PREREQUISITES TO BRING AN ACTION FOR CONTRIBUTION.

Because the Seventh Circuit found that CERCLA preempted PMC's § 113(f)(1) contribution claim, it did not address the additional grounds that Sherwin-Williams raised in its brief to deny PMC any recovery under the Illinois Contribution Act. These grounds would have barred PMC from any recovery under the state statute independent of the application of the preemption doctrine.

By pursuing a "stand-alone" contribution claim against Sherwin-Williams in its federal complaint after the State of Illinois filed a separate lawsuit against PMC which addressed the underlying claim, PMC violated one of the basic preconditions to obtaining recovery under the Illinois Contribution Act because PMC was required to bring its contribution claim in its litigation with the State. The Illinois Supreme Court made clear in *Laue v. Leifheit*, 473 N.E. 2d 939 (Ill. 1984), that there is a strong public policy behind requiring parties to litigate percentages of liability claims in one proceeding. The Illinois Supreme Court reaffirmed this requirement in *Henry v. St. Johns Hospital*, 563 N.E. 2d 410, 414 (Ill. 1990), where the court held that any time a joint tortfeasor fails to bring a joint contribution claim in an action where all parties' liability can be assessed, the contribution claim is a nullity: "Where there is a pending action, the contribution claim must be asserted in that action." PMC's failure to adhere to this precondition of obtaining recovery under the Illinois Contribution Act would have precluded it from obtaining any damages independent of the Seventh Circuit's ruling on preemption.

Moreover, through a mistake in judgment, PMC incurred unnecessary response costs that constitute a substantial percentage of the past response costs that PMC seeks in this case. The district court recognized that PMC made an erroneous characterization of the soil for disposal (resulting in unnecessary disposal costs), Pet. App. at B-13, and yet, despite the court's finding as to PMC's mistake, the district court assessed all of the cost of the mistake to Sherwin-Williams, *Id.* at B-23. Sherwin-Williams raised this error in the Seventh Circuit appeal, and absent the Seventh Circuit's preemption ruling, the error would have barred PMC's recovery under the Illinois Contribution Act.

Finally, although not raised by the parties in this lawsuit, it is reasonable to assume that the Illinois Supreme Court, in light of its past concerns with protecting our environment, (*see People v. Brockman*, 574 N.E. 2d 626 (Ill. 1991), would not permit recovery under the Illinois Contribution Act where a joint tortfeasor has failed to comply with the dictates of the national contingency plan. Until Illinois courts decide this issue, it would be premature for this Court to address the issue of federal preemption in this context.

PMC's petition should be denied because PMC is not entitled to a recovery under the Illinois Contribution Act even if this Court were to agree with PMC's arguments on preemption.

CONCLUSION

For the reasons given above, this Court should deny PMC's Petition for Writ of Certiorari.

Respectfully submitted,

J. TIMOTHY EATON
Counsel of Record
WILLIAM L. SIEBERS
UNGARETTI & HARRIS
3500 Three First National Plaza
Chicago, Illinois 60602
(312) 977-4400

KIM K. BURKE
J. STEVEN JUSTICE
TAFT, STETTINIUS
& HOLLISTER L.L.P.
1800 Star Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

Attorneys for Respondent